No. 48609-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MORRIS RICHARD KEITH JR.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

---

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Constitutional Provisions

Other Rules or Authorities

I. ISSUES

A. Did the trial court err when it denied to give Keith's requested self-defense jury instruction?

B. Did the trial court err when it refused to allow Keith's trial counsel to introduce into evidence Mr. Moon's prior assault conviction?

C. Did the trial court err when it required Keith to get a drug and alcohol evaluation as part of his judgment and sentence?

II. STATEMENT OF THE CASE

Kimberly Brooks owns a house on Central Boulevard in Centralia, Washington, where she lives with her boyfriend, Justin Moon. RP 70-71, 100-01. The house has a detached, single-car garage. RP 71, 102. The garage has two doors, a large bay door and a man door. RP 72. Between the garage and the house there is a patio with a barbeque. RP 71, 101-02. Mr. Moon likes to go out to the garage and listen to music, often times rather loud. RP 73, 102-03. The neighbors have previously complained about the volume of the music and have even called the police. RP 102-03.

On May 31, 2015, around 9:00 p.m., Mr. Moon and Ms. Brooks were barbequing and listening to rap music from the stereo in their garage. RP 70-71, 73, 101-102. The music was pretty loud, but not so loud that they could not hear each other talk. RP 73, 103.

Mr. Moon was in the garage with its doors open when a neighbor, Morris Keith, came over to the house. RP 73-74. Mr. Moon looked up and saw Keith standing at the end of the garage, outside of it, with a sledgehammer in his hand. RP 74. Mr. Moon said hello to Keith and walked over to turn his stereo down. RP 74. Keith told Mr. Moon to, "'[t]urn that nigger shit off.'" RP 75.

Words were exchanged back and forth between Mr. Moon and Keith about the music. RP 247. Keith told Mr. Moon repeatedly to turn it off and Mr. Moon told Keith it was his house and he could do as he wished. RP 75-76, 159. Keith then struck Mr. Moon in the groin and then the face with the hammer. RP 77-78, 107, 161. Mr. Moon did not have anything in his hands when he was struck by Keith. RP 162.

Ms. Brooks got in between Keith and Mr. Moon. RP 109. Ms. Brooks told Keith to go home. RP 109. Keith kept telling Ms. Brooks he was going to kill them, he then grabbed Mrs. Brooks by the throat and told her to shut up. RP 110. Ms. Brooks could feel Mr. Moon trying to talk and blood coming down her neck and shirt from Mr. Moon. RP 110.

Keith walked out of the garage and handed the sledgehammer to his wife, Crystal. RP 111-12. Ms. Brooks called

the police. RP 113. Ms. Brooks got paper towels for Mr. Moon's face. RP 78, 113.

Centralia Police Officer Humphrey arrived on the scene and could see Mr. Moon's nose was "pretty much flat and his face had blood all over." RP 130. Keith came back over to the house and Mr. Moon pointed him out to the police. RP 82-83, 133. Officer Humphrey intercepted Keith and placed him in handcuffs. RP 133.

Keith told Officer Humphrey he had gone over to Mr. Moon's house because he was tired of listening to that kind of music. RP 135. Keith then told Officer Humphrey, Mr. Moon got in Keith's face and Keith pushed Mr. Moon. RP 135. According to Keith, Mr. Moon all of sudden had the hammer and swung, so Keith blocked, and then grabbed the hammer away from Mr. Moon. RP 135-36. Keith did not appear to have any injuries. RP 136. The sledgehammer was recovered on the roof of a shed that is located in the southwest corner of Keith's fenced yard. RP 189.

Mr. Moon's nose was swollen and deformed. RP 204. Mr. Moon also had a cut on his check that took three sutures to close. RP 204, 208. Mr. Moon had multiple, serious, nasal fractures that would require surgical reduction to fix. RP 206.

The State charged Keith with Count I: Assault in the Second Degree while armed with a deadly weapon, Count II: Burglary in the First Degree, with the special allegation it was committed while the victim was present, and Count III: Harassment – Threat to Kill. CP 1-4. Keith elected to have his case tried to a jury. *See* RP.

Prior to the trial commencing the State filed a motion in limine, asking the trial court to preclude Keith from being able to present evidence that Mr. Moon had previously been convicted of Assault in the Third Degree and Possession of a Controlled Substance. CP 19. The trial court heard the motion on the morning of the trial. RP 40-53. Keith's trial counsel informed the trial court that Keith was pursuing a self-defense claim. RP 42. Trial counsel made an offer of proof that Keith knew of the Assault in the Third Degree conviction prior to this incident. RP 41. The trial court ultimately ruled that the Assault in the Third Degree only would come in if Keith were to testify that he committed the Assault in the Second Degree and at the time he was aware of Mr. Moon's assaultive behavior. RP 46-47.

Keith testified on his own behalf. RP 235-74. According to Keith, he went over to Mr. Moon's house to return a hammer he had borrowed about a month earlier and to ask Mr. Moon to turn

down the music. RP 245. Keith explained he yelled at Mr. Moon, who was in the garage, from the bay door of the garage but Keith could not get Mr. Moon's attention. RP 247. Keith then went around to the other side of the building and pounded on the side door, which got Mr. Moon's attention. RP 247. Keith and Mr. Moon argued back and forth about the music. RP 247. Keith testified, "I turned the music down, and we had a discussion about the music. Then I tossed the hammer onto his bench at the back of the garage." RP 249. Keith further explained that it was Mr. Moon who picked up the hammer and swung it at Keith, which hit his prosthetic leg. RP 249. Keith said he bumped in to Ms. Brooks, who had come into the garage and was yelling at Keith. RP 249-51. Keith testified Mr. Moon swung the hammer at Keith again, Keith blocked and got a hold of the hammer. RP 251. According to Keith, the two men then had a back and forth with the hammer and Mr. Moon was hit in the face. RP 251. Keith also testified that the hammer was thrown at him as he exited the garage. RP 255.

The State put on rebuttal evidence. RP 284-96. Officer Humphrey testified there were cars parked in front of the garage. RP 285. Officer Humphrey also said Keith never told her the hammer had been thrown at him. RP 288-89. When asked where

the hammer had come from, Keith had told Officer Humphrey, "'I couldn't tell ya.'" RP 293. Keith also told Officer Humphrey, "'He swung at me, I blocked him, and turned around and hit him with it.'" RP 293. Keith told Officer Humphrey that he did not bring the hammer. RP 296.

Keith requested the trial court instruct on self-defense. RP 309; CP 25. The trial court denied Keith's request. RP 313-14. The trial court reasoned because Keith did not admit to intentionally assaulting Mr. Moon, although the trial court did acknowledge there was a statement to the police that Keith swung the hammer. RP 309, 313-14.

The jury convicted Keith of the Assault in the Second Degree, including the special allegation that he was armed with a deadly weapon. CP 58-59. Keith was acquitted of the Burglary in the First Degree and the Harassment – Threat to Kill charges. CP 60, 62. Keith was sentenced to 18 months in prison. CP 66. Keith timely appeals his conviction. CP 73.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE KEITH'S REQUESTED JURY INSTRUCTION ON SELF-DEFENSE.

Keith argues the trial court erred when it failed to give his requested jury instruction on self-defense. Appellant's Brief 7-13. The State concedes that the trial court erred in failing to give the proposed self-defense instruction. The State further concedes the error is not harmless beyond a reasonable doubt and therefore this Court should reverse and remand this case back to the trial court for a new trial.

1. Standard Of Review

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Bennett,* 161 Wn.2d at 307. Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

2. The Trial Court Gave The Proper Self Defense Instructions.

Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d

503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin,* 100 Wn.2d 417, 420, 670 P.2d 265 (1983). A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond,* 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). "When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party." *Webb*, 162 Wn. App. at 208, *citing State v. Hanson,* 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990).

A defendant is entitled to a jury instruction on self-defense if the defendant produces some evidence that demonstrates self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (citation omitted). It is for the trial court to determine if the evidence is sufficient to warrant giving a self-defense instruction. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). "Because the defendant is entitled to benefit of all the evidence, his

defense may be based on facts inconsistent with his own testimony." *Callahan*, 87 Wn. App. at 925.

Once the defendant is entitled to the self-defense instruction, it then becomes the State's burden to prove beyond a reasonable doubt the absence of self-defense. *Walden*, 131 Wn.2d at 473.

> Evidence of self-defense is evaluated from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. This standard incorporates objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Id. at 474. A person is only entitled to use the degree of force necessary that a reasonable prudent person would find necessary under similar conditions as they appeared to the defendant. *Id.*

"The refusal to give an instruction on a party's theory of the case when there is supporting evidence is reversible error when it prejudices the party." *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (citation omitted). "An error in instructions is harmless if it is 'trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" State v. McCullum, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983), *citing State v. Savage*,

94 Wn.2d 569, 578, 618 P.2d 82 (1980); *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977); *State v. Golladay*, 78 Wn.2d 121, 139, 470 P.2d 191 (1970). An error by the trial court in failing to give a defendant's proposed self-defense instruction requires reversal unless this Court can find it is harmless beyond a reasonable doubt. *State v. Arth*, 121 Wn. App. 205, 213, 87 P.3d 1206 (2004).

The State concedes that the trial court should have given Keith's proposed self-defense instruction, as there was some evidence that Keith acted in defense of himself when he struck Mr. Moon in the face with the sledgehammer. The trial court apparently erroneously believed that Keith himself must testify that he intentionally struck Mr. Moon in the face with the sledgehammer. RP 313-14. The trial court acknowledged, yet seemed to discount, the evidence presented by the State on rebuttal, which was Keith's statement that he had intentionally swung the hammer and hit Mr. Moon after Mr. Moon had swung that hammer at Keith. RP 293, 309. Keith gets the benefit of all the evidence presented, including evidence presented by the State. *Callahan*, 87 Wn. App. at 933.

The State cannot find an example of when a failure to give a self-defense instruction was harmless beyond a reasonable doubt.

Nor does the State believe in good faith it could argue such a standard has been met here. Here there is conflicting testimony as to what occurred in the garage. The State presented three witnesses that said Mr. Moon never had the sledgehammer, it was Keith who was solely in possession of the sledgehammer, and quickly and aggressively attacked Mr. Moon with the sledgehammer. RP 76-78, 94, 107-09, 116, 123-25, 161-63. There was testimony from Keith that it was Mr. Moon who attacked with the sledgehammer and Keith blocked the attack and there was a struggle over the hammer. RP 249, 251. There was conflicting testimony if Keith intentionally hit Mr. Moon with the hammer. RP 251, 268, 293. Keith's statement to Officer Humphrey stated that he had struck Mr. Moon with the hammer only after Mr. Moon had swung the hammer at Keith and Keith had blocked the attack. RP 293.

While the State feels its evidence supporting its conviction of Keith is strong, it cannot argue that the error is harmless beyond a reasonable doubt. The contradicting statements and facts are for the jury to decide and without the proper jury instruction on self-defense it cannot be said that failure to give the instruction did not affect the final outcome of the case. Therefore, the State is left with

no other choice but to ask this Court to remand the case for a new trial.

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED KEITH'S REQUEST TO ADMIT MR. MOON'S PRIOR ASSAULT IN THE THIRD DEGREE CONVICTION.

Keith argues that his constitutional right to present a complete defense was violated when the trial court denied his request to include evidence of Mr. Moon's prior assault conviction, which Keith asserted he was aware of prior to the incident. Brief of Appellant 13-20. The State has already conceded this case must be reversed and remanded due to the trial court's error in failing to give the proper self-defense instruction. The State only responds to this argument because this issue will come up again during the retrial. The trial court abused its discretion when it ruled Keith could not testify that he was aware of Mr. Moon's prior assault as Keith informed the trial court he was asserting a self-defense claim.

1. Standard Of Review.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted).[1] The

[1] Simply alleging a constitutional rights violation does not make an evidentiary ruling reviewed under a de novo standard instead of an abuse of discretion standard. *See In re Pers. Restraint of Morris,* 176 Wn.2d 157, 168, 288 P.3d 1140 (2012); *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010).

interpretation of an evidentiary rule is reviewed de novo. *State v. De Vincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

It is an abuse of discretion when the trial court bases its decision on untenable reasons or grounds or the decision is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

2. Invoking The Compulsory Process Clause And The Right Of Confrontation Guaranteed By The Sixth Amendment Does Not Guarantee A Criminal Defendant's Proposed Evidence Is Admissible.

The Fourteenth Amendment to the United States Constitution guarantees that the State will not deprive a person of their liberty without due process of law. The Fourteenth Amendment guarantees that a person accused of a crime has the right to a fair trial. *State v. Statler*, 160 Wn. App. 622, 637, 248 P.3d 165 (2011), *review denied,* 172 Wn.2d 1002 (2011), *citing State v. Davis,* 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). "[T]he right to

due process provides heightened protection against government interference with certain fundamental rights." *Id.* (citations and internal quotations omitted). To satisfy the right to a fair trial, the trial court is not required to ensure the defendant has a perfect trial. *Id.*, *citing In re Elmore,* 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

The due process right, in its essence, is the right for a criminal defendant to have a fair opportunity to defend him or herself against the State's accusations. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *citing Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (quotations omitted). A defendant is guaranteed the right to confront and cross-examine witnesses who testify against him or her and the right to compel a witness to testify. U.S. Const. amend. VI. "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *Jones*, 168 Wn.2d at 720. Unlike other rights guaranteed under the Sixth Amendment, the Compulsory Process Clause requires an affirmative act by a defendant and is not automatically set into play by the initiation of an adversarial process. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). "The very nature of the right

requires that its effective use be preceded by deliberate planning and affirmative conduct. *Taylor v. Illinois*, 484 U.S. at 410.

A defendant does not have an absolute right to present evidence. *Jones*, 168 Wn.2d at 720. Without adherence to the rules of evidence and other procedural limitations the adversary process would not function effectively because it is imperative that each party be given a fair opportunity, within the rules, "to assemble and submit evidence to contradict or explain the opponent's case." *Taylor v. Illinois*, 484 U.S. at 410-11.

Evidence presented by a defendant must be at the very least minimally relevant and there is no constitutional right for a defendant to present irrelevant evidence. *Jones*, 168 Wn.2d at 720. If a defendant can show that the evidence is relevant then the burden shifts to the State to show the trial court that the evidence is so prejudicial that it will "disrupt the fairness of the fact-finding process at trial." *Id.* Invoking the right to compulsory process is not a free pass to present evidence that would be considered inadmissible under the Rules of Evidence. *Taylor v. Illinois*, 484 U.S. 414.

3. The Trial Court Abused Its Discretion When It Ruled Mr. Moon's Prior Assault That Keith Was Aware Of At The Time Of The Incident Was Inadmissible.

Keith asserts he was denied the right to present a defense because the trial court would not allow him to introduce evidence to show Keith knew Mr. Moon had been previously convicted of assault at the time he acted in self-defense. Brief of Appellant. 13-20. Keith is correct. The trial court erred.

The proponent of evidence must establish its relevance, materiality, and the elements of a required foundation, by a preponderance of the evidence. *State v. Nava*, 177 Wn. App. 272, 290, 311 P.3d 83 (2013) (citations omitted); *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011).

A defendant who wishes to present a self-defense claim must produce evidence to show he or she had a reasonable apprehension of harm. *State v. Walker*, 136 Wn.2d 767, 772, 996 P.2d 883 (1998). Self-defense has an objective and subjective inquiry which the trial court must conduct. *Walker*, 136 Wn.2d at 772. "The subjective aspect of the inquiry requires the trial court to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant." *Id.* The objective portion of the inquiry requires the trial "court to

determine what a reasonable person in the defendant's situation would have done." *Id.*

If a defendant, raising a self-defense claim, wants to introduce evidence regarding the victims character it will be allowed under two exceptions. *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.3d (1972); 5D Karl D. Tegland, Washington Practice, Evidence § 404:5, at 168-69 (2015-16). A defendant may introduce evidence regarding the victim's reputation for violence, which is pertinent to show in a self-defense claim if the victim was the first aggressor. *State v. Alexander,* 52 Wn. App. 897, 900, 765 P.2d 321 (1988). A defendant may also introduce specific acts of violence, but only when the defendant had knowledge of the act, it is not too remote in time, and it is admissible to show the defendant's state of mind at the time of the crime and indicate whether he or she had reason to fear bodily harm. *Cloud*, 7 Wn. App. at 218.

Keith's attorney proffered to the trial court that Keith knew about Mr. Moon's assault conviction prior to the incident with the sledgehammer. RP 41. According to trail counsel, Keith was aware of this conviction because it occurred at a neighbor's house and Mr. Moon had assaulted someone with a rock. RP 41. This information would have been admissible as Keith was raising a self-defense

claim, as part of his claim to show his reasonable fear of bodily harm and his state of mind at the time of the incident. Therefore, the trial court abused its discretion when it ruled Mr. Moon's prior assault conviction was not admissible.

C. CONDITIONS OF KEITH'S JUDGMENT AND SENTENCE.

The State will not address the argument raised by Keith in regards to the trial court requiring him to get a drug and alcohol evaluation as part of his judgment and sentence. As the State has conceded that Keith's case must be reversed and remanded for retrial, this argument has been rendered moot.[2]

IV. CONCLUSION

The trial court erred when it failed to give Keith's requested jury instruction on self-defense. The error is not harmless and this Court should reverse Keith's conviction and remand the matter for retrial. The trial court also erred when it ruled Mr. Moon's prior assault conviction was not admissible. The State will not address the remaining issues addressed by Keith, as it has already

[2] The State is not addressing the appellate costs argument either, and this concession brief is another good example of why we should not be briefing appellate costs in initial briefing. The State is obviously not going to be the prevailing party in this matter. Even if the State was the prevailing party, there is no way for Keith to know if the State would be seeking costs until the State chose to do so. It is a waste of time and resources to make these arguments in the initial briefing process.

conceded this case must be reversed and remanded, which renders all remaining issues raised in Keith's brief moot.

RESPECTFULLY submitted this 4th day of November, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. MORRIS RICHARD KEITH, JR., Appellant.	No. 48609-1-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On November 4, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jodi R. Backlund, Backlund & Mistry, attorney for appellant, at the following email addresses: backlundmistry@gmail.com.

DATED this 4th day of November, 2016, at Chehalis, Washington.

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

November 04, 2016 - 3:59 PM

Transmittal Letter

Document Uploaded: 5-486091-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 48609-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com